SUBRAMANYAH AJ KARUPPIAH A

v.

BANK NEGARA MALAYSIA

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
RAMLY ALI JCA
T SELVENTHIRANATHAN JCA
[CIVIL APPEAL NO: W-02-205-2001]
1 DECEMBER 2009 C

ADMINISTRATIVE LAW: *Dismissal from service - Dismissal of Bank Negara Malaysia temporary worker - Worker subject to BNM contract of employment - Whether worker a public officer - Whether protection and benefits under Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 applicable - Federal Constitution, art. 132* D

ADMINISTRATIVE LAW: *Public servants - Dismissal of Bank Negara Malaysia temporary worker - Worker subject to BNM contract of employment - Whether worker a public officer - Whether protection and benefits under Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 - Federal Constitution, art. 132* E

CIVIL PROCEDURE: *Appeal - New points, introduction of - In what circumstances may such points be raised - Raising of new point would result in allowing new line of defence or plea without hearing fresh evidence - Prejudicial to opponent - New point not allowed* F

CONSTITUTIONAL LAW: *Public servants - Dismissal of Bank Negara Malaysia temporary worker - Worker subject to BNM contract of employment - Whether worker a public officer - Whether protection and benefits under Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 applicable to worker - Federal Constitution, art. 132* G

EMPLOYMENT: *Contract of service - Termination of services - Dismissal of Bank Negara Malaysia temporary worker - Worker subject to BNM contract of employment - Right to mitigate before punishment - Whether worker afforded chance to make representation - Whether rules of natural justice could be invoked - Whether termination justified - Whether worker entitled to relief of reinstatement* H I

A ***LABOUR LAW:*** *Employment - Termination - Validity - Dismissal of Bank Negara Malaysia temporary worker - Whether plaintiff a public officer - Whether fair hearing accorded before termination - Whether employment relationship governed by contract between parties*

B ***PUBLIC SERVANTS:*** *Dismissal - Dismissal of Bank Negara Malaysia temporary worker - Worker subject to BNM contract of employment - Whether worker a public officer - Whether protection and benefits under Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 applicable to worker - Federal Constitution, art. 132*

C The appellant was employed by the respondent ('BNM') *vide* a letter of appointment dated 26 January 1981 as "Kakitangan Matawang (Sementara)". While in employment, the appellant's conduct was not satisfactory and BNM issued a notice to show cause to the appellant setting out various allegations of D misconducts against him. The appellant responded to the notice. Nevertheless, a disciplinary inquiry was convened to enquire into the allegations of misconduct against the appellant. The appellant attended the inquiry and was afforded all opportunity to explain or defend the allegations against him by the disciplinary committee. E The appellant was later given opportunity to produce documentary evidence to support his explanations to the allegations during a second disciplinary inquiry. Further, by a letter, the appellant provided further explanations and documentary evidence relating to the allegations of misconduct against him. The disciplinary F committee found the appellant's explanation to be unsatisfactory and the appellant was found guilty under paras. 4(2)(g), (i), (f) of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 ('General Orders'). Accordingly, the appellant's employment with BNM was terminated. The appellant G was duly informed of the decision *vide* a letter, which also stated the appellant's right to appeal to the Governor of BNM within 14 days against the punishment imposed. The appellant appealed acknowledging his mistake and mitigated against the punishment, requesting to be allowed to continue employment with BNM. The H Governor of BNM however rejected the appellant's appeal. The appellant then filed a claim against BNM in the High Court seeking, *inter alia*, a declaration that his dismissal was null and void, and for a declaration that he be reinstated. The appellant also claimed for arrears of salary, allowance and other emoluments. I The High Court dismissed his claim and hence this appeal. The issues for determination were: (i) whether the General Orders were applicable to the present case and, if the answer was in the

affirmative, whether it was complied with; and (ii) whether the decision of BNM was fatally flawed on the ground that the appellant was not given the opportunity to mitigate before the punishment of dismissal was imposed on the appellant. The appellant applied (*vide* encl. 22a) for leave to include a further ground of appeal in the Memorandum of Appeal. The appellant claimed that this further ground was inadvertently excluded by his previous solicitors.

Held (dismissing the appeal with costs)
Per Ramly Ali JCA:

(1) To justify the new point to be raised on appeal, it must be shown that the new point comes within the established exceptions, *ie*, jurisdiction, illegality or where, if the evidence on which the appellate court is asked to decide, if investigated, would fully support the new plea. The ground for the appellant's application did not fall within any one of the established exceptions accepted by the courts. To allow the application would result in allowing a new line of defence or plea without hearing fresh evidence. The new point sought to be raised by the appellant would be prejudicial to BNM as its witnesses were not afforded an opportunity to respond or defend the appellant's allegation. Thus, the application (*vide* encl. 22a) was dismissed. (paras 16-17)

(2) The General Orders are applicable to public officers who hold office in the public offices as set out in art. 132 of the Federal Constitution ('art. 132'). The appellant was employed by BNM under a contract of employment and was subjected to the terms and conditions contained therein. The contract did not make any specific reference to the applicability of the General Orders. The officers and employees of BNM are appointed under s. 15 of the Central Bank of Malaysia Act 1958. They are subject to the terms and conditions of service as may be determined by BNM. The appellant did not fall within the categories of public officers or employees in art. 132, and thus was not eligible for the protection and benefits under the General Orders. (paras 26 & 28)

(3) The adoption or incorporation of such General Orders in the appellant's notice to show cause and letter of decision by the disciplinary committee did not have the legal effect of making

him a holder of any such public office as categorized under art. 132. It did not translate to the General Orders being applicable to the appellant. (para 34)

(4) The relief of reinstatement is only open to employees who lodge a claim for unfair dismissal pursuant to s. 20 of the Industrial Relations Act 1967, or to a holder of a public office as categorized under art. 132. Since the appellant did not come within either category, the relief of reinstatement was not available to him; and his only remedy, if any, was for breach of contract and damages. (paras 37 & 38)

(5) The appellant's terms and conditions of employment did not include a mandatory right to mitigate before a punishment was imposed by the disciplinary committee of BNM. Nevertheless, the appellant was given a notice to show cause and was afforded the chance to explain and to make representation. The appellant's mitigation in his appeal to the Governor of BNM before the punishment was affirmed, was sufficient. BNM's decision to dismiss the appellant on all the five charges of misconducts against him was a reasonable decision in view of the circumstances of the case. (paras 40-41)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah diambil kerja oleh responden ('BNM') melalui surat pelantikan bertarikh 16 Januari 1981 sebagai "Kakitangan Matawang (Sementara)". Semasa perkhidmatannya, kelakuan perayu tidak memuaskan dan BNM mengeluarkan notis tunjuk sebab kepada perayu yang menyatakan beberapa alegasi salahlaku terhadapnya. Perayu menjawab notis tersebut. Meskipun begitu, suatu siasatan tatatertib diadakan untuk menyiasat alegasi salahlaku terhadap perayu. Perayu menghadiri siasatan tersebut dan diberi peluang sepenuhnya untuk menerangkan atau membela alegasi terhadapnya oleh jawatankuasa tatatertib. Perayu kemudiannya diberi peluang untuk mengemukakan keterangan dokumentari untuk menyokong penerangannya terhadap alegasi tersebut semasa siasatan tatatertib kedua. Tambahan lagi, melalui surat, perayu menyediakan penerangan-penerangan lanjutan dan keterangan dokumentari berhubungan dengan alegasi salahlaku terhadapnya. Jawatankuasa tatatertib mendapati penerangan perayu tidak memuaskan dan perayu didapati bersalah di bawah perenggan-perenggan 4(2)(g), (i), (f) Perintah-Perintah Am (Kelakuan dan Tatatertib) (Bab D) 1980 ('Perintah Am'). Oleh itu, pekerjaan

perayu dengan BNM ditamatkan. Perayu diberitahu tentang keputusan itu melalui sepucuk surat, yang juga menyatakan hak perayu untuk merayu ke Gabenor BNM dalam masa 14 hari terhadap hukuman yang dikenakan. Perayu merayu, dengan mengakui kesilapannya dan meminta mitigasi terhadap hukuman itu, dengan meminta untuk dibenarkan menyambung pekerjaannya dengan BNM. Gabenor BNM walau bagaimanapun menolak rayuan perayu. Perayu selepas itu memfailkan suatu tuntutan terhadap BNM dalam Mahkamah Tinggi menuntut, antara lain, suatu deklarasi bahawa penamatan kerjanya adalah batal dan tak sah, dan bagi suatu deklarasi bahawa beliau dikembalikan semula. Perayu juga menuntut bagi tunggakan gaji, alaun dan emolumen lain. Mahkamah Tinggi menolak rayuannya dan oleh itu rayuan semasa dibuat. Isu-isu untuk ditentukan adalah: (i) sama ada Perintah Am boleh digunapakai dalam kes semasa dan, jika jawapannya adalah berbentuk afirmatif, sama ada ia telah dipatuhi; dan (ii) sama ada keputusan BNM adalah cacat secara fatal atas alasan bahawa perayu tidak diberikan peluang untuk bermitigasi sebelum hukuman penamatan kerja dikenakan atas perayu. Perayu memohon (melalui lampiran 22a) bagi kebenaran untuk memasuki satu lagi alasan rayuan di dalam Memorandum Rayuan. Perayu menghujah bahawa alasan lanjutan ini telah dikecualikan secara tidak sengaja oleh peguamcara dahulunya.

Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMR:

(1) Untuk menjustifikasikan perkara baru ditimbulkan atas rayuan, ia mesti dibuktikan bahawa perkara baru tersebut termasuk dalam pengecualian-pengecualian mantap, iaitu, ketidaksahan atau di mana, jika keterangan atas mana mahkamah rayuan diminta memutuskan, jika disiasat, akan menyokong sepenuhnya rayuan baru. Alasan bagi permohonan perayu tidak termasuk dalam mana-mana pengecualian mantap yang diterima oleh mahkamah-mahkamah. Untuk membenarkan rayuan ini akan mengakibatkan kebenaran satu pembelaan atau rayuan baru tanpa mendengar keterangan baru. Perkara baru yang perayu ingin menimbulkan akan memprejudiskan BNM kerana saksi-saksinya tidak diberikan peluang untuk menjawab atau membela alegasi perayu. Oleh yang demikian, permohonan (melalui lampiran 22a) ditolak.

A **(2)** Perintah Am boleh digunapakai terhadap pegawai-pegawai am yang memegang jawatan dalam jawatan-jawatan am seperti yang dinyatakan dalam Perkara 132 Perlembagaan Persekutuan ('Perkara 132'). Perayu telah diambil kerja oleh BNM di bawah kontrak pekerjaan dan tertakluk kepada terma-terma
B dan syarat-syarat yang dikandung dalamnya. Kontrak itu tidak membuat apa-apa rujukan khusus kepada kegunapakaian Perintah Am. Pegawai-pegawai dan pekerja-pekerja BNM dilantik di bawah s. 15 Akta Bank Negara Malaysia 1958. Mereka tertakluk kepada terma-terma dan syarat-syarat
C perkhidmatan seperti yang ditentukan oleh BNM. Perayu tidak termasuk dalam kategori-kategori pegawai-pegawai atau pekerja-pekerja am di dalam Perkara 132, dan oleh itu tidak layak mendapat perlindungan dan faedah-faedah di bawah Perintah Am.

D **(3)** Penggunaan dan penggabungan Perintah Am sebegitu di dalam notis tunjuk sebab perayu dan surat keputusan oleh jawatankuasa tatatertib tidak mempunyai kesan di sisi undang-undang untuk menjadikannya pemegang mana-mana jawatan
E am seperti yang diperuntukkan di bawah Perkara 132. Ia tidak bermaksud bahawa Perintah Am boleh digunapakai kepada perayu.

(4) Relief perlantikan semula hanya terbuka kepada pekerja-pekerja
F yang membuat tuntutan penamatan kerja yang tidak adil menurut s. 20 Akta Perhubungan Perusahaan 1967, atau kepada seorang yang memegang jawatan am seperti yang diperuntukkan di bawah Perkara 132. Oleh kerana perayu tidak termasuk dalam mana-mana satu kategori, relief perlantikan
G semula tidak terbuka baginya; dan rayuan tunggalnya, jika ada, adalah untuk perlanggaran kontrak dan gantirugi.

(5) Terma-terma dan syarat-syarat pekerjaan perayu tidak termasuk hak mandatori untuk meringankan sebelum suatu hukuman dikenakan oleh jawatankuasa tatatertib BNM. Walaupun
H begitu, perayu telah diberikan notis untuk tunjuk sebab dan telah diberikan peluang untuk menerangkan dan untuk membuat representasi. Mitigasi perayu dalam rayuannya ke Gabenor BNM sebelum hukuman diesahkan, adalah mencukupi. Keputusan BNM untuk menolak perayu atas
I kesemua lima tuduhan salahlaku terhadapnya adalah suatu keputusan yang munasabah memandangkan keadaan kes.

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Browne v. Dunn [1893] 6 R 67 ***(refd)***

Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Ultra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Lim Geak Liang v. East West UMI Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***

Mohd Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 3 CLJ 135 FC ***(refd)***

Muniandy & Anor v. Muhammad Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC ***(refd)***

R v. Gaming Board for Great Britain, ex parte Beraim and Khaido [1970] 2 QB 417 ***(refd)***

Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 LNS 139 PC ***(refd)***

Ridge v. Baldwin [1964] AC 40 ***(refd)***

S Mariappan v. The Government of Malaysia [1983] 2 CLJ 124; [1983] CLJ (Rep) 382 FC ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

United Marketing Co v. Hasham Kara [1961] 1 LNS 147 PC ***(refd)***

Legislations referred to:

Central Bank of Malaysia Act 1958 (Revised 1994), ss. 3, 15(2)

Federal Constitution, arts. 132(2), 135(2)

Industrial Relations Act 1967, s. 20

Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 2, 4(2)(g), (i), (f)

For the appellant - M Manoharan; M/s M Manoharan & Co

For the respondent - Janice Leo (Syarihah Razman with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Suit No: S8(S4)-21-75-1992]

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali JCA:

Introduction

[1] This is an appeal against the judgment of the High Court dated 30 January 2001 dismissing the appellant's suit with costs against his employer, Bank Negara Malaysia (BNM), the respondent.

[2] The appellant's claim against BNM are as follows:

(a) for a declaration that his dismissal on 12 July 1989 *vide* letter dated 12 July 1989 from the Chairman, Disciplinary Committee of BNM, as a general assistant lower grade, is null and void and of no legal effect and that he is still a general assistant, lower grade;

(b) for an order for an account of all arrears of salary, allowance and other emoluments that he ought to receive from the date of dismissal and the same be paid to him;

(c) for a declaration that he be reinstated without any loss of rank, opportunities for promotion or any other benefits;

(d) for damages;

(e) for interest on the sum adjudged from the date of judgment until satisfaction; and

(f) further or other reliefs deemed fit and proper by the court.

Factual Background

[3] The appellant was employed by BNM *vide* a letter of appointment dated 26 January 1981 as "Kakitangan Matawang (Sementara)". One of the terms of the employment is that "kakitangan sentiasa dikehendaki patuh kepada syarat-syarat kerja yang telah ditentukan oleh Bank Negara Malaysia".

[4] While in employment, the appellant's conducts were not satisfactory. On or about 11 April 1989, BNM issued a notice to show cause to the appellant setting out various allegations of misconducts against him. The alleged misconducts were:

(a) entering the work place (ie, mail section) without security pass;

(b) persistent late coming or leaving the work place early;

(c) absent from work;

(d) refusal to furnish information about his reasons for being absent;

(e) offences of insubordination; and

(f) wrongfully declared himself as being BNM's Chief Security Officer.

[5] In the same notice, the appellant was required to provide a written explanation on all the allegations made against him. Paragraph 6 of the said notice states:

> 6. Dengan ini, saudara adalah diminta memberi jawapan kepada pertuduhan yang dikemukakan dengan memberi sebab mengapa tindakan tatatertib tidak sepatutnya diambil ke atas saudara kerana telah melanggar peraturan-peraturan tatatertib. Jawapan dan hujah saudara hendaklah dikemukakan kepada Pengurus, Jabatan Personel dalam tempoh 14 hari dari tarikh surat ini. Sekiranya saudara tidak memberi sebarang jawapan dalam tempoh masa yang ditetapkan, saudara akan dianggap tidak mahu membela diri dan perkara ini akan diputuskan berdasarkan keterangan-keterangan yang ada sekarang ini sahaja.

[6] On 24 April 1989, the appellant responded to provide his three pages written explanation to the said notice.

[7] On 24 May 1989, the first disciplinary inquiry was convened to enquire into the allegations of misconduct against the appellant. The appellant and three other witnesses were called. The appellant attended and was afforded all opportunity to explain or defend the allegations against him by the disciplinary committee.

[8] The appellant was subsequently given an opportunity to produce further documentary evidence to support his explanations to the said allegations during the second disciplinary inquiry held on 31 May 1989. By a letter dated 30 May 1989, the appellant provided further explanations and documentary evidence relating to the allegations of misconduct against him.

[9] After considering all the facts and evidence placed before it, the disciplinary committee found the appellant's explanation to be unsatisfactory and the appellant was found guilty under paras. 4(2)(g), (i), (f) of the Public Officers (Conduct and Discipline) (Cap. D) the General Orders 1980 (General Orders). Accordingly, the appellant's employment with BNM was terminated.

[10] The appellant was duly informed of the decision *vide* letter dated 12 July 1989. In the same letter, the appellant was also informed of his right to appeal to the Governor of BNM within 14 days against the punishment imposed.

[11] By a letter dated 24 July 1989, the appellant appealed against his dismissal to the Governor of BNM. In the said five paragraphs letter the appellant acknowledged his mistake and

A mitigated against the punishment; and requested he be allowed to continue employment with BNM. The Governor of BNM, by letter dated 13 April 1990, rejected the appellant's appeal.

[12] The appellant then filed a claim against BNM in the High B Court for the various declarations and damages. The High Court dismissed his claim. Hence the present appeal before this court.

Appellant's Application For Leave To Include A Further Ground Of Appeal In The Memorandum Of Appeal

C **[13]** At the outset, the appellant made an application (*vide* encl. 22a) for leave of the court to include a further ground of appeal in the Memorandum of Appeal. The additional ground is:

> Yang Arif Hakim perbicaraan yang bijaksana telah tersalah dalam D tidak memutuskan bahawa:
>
> > Perkara-perkara 'extraneous' telah dipertimbangkan oleh jawatankuasa Tatatertib apabila membuat keputusannya untuk membuang kerja plaintif. Plaintif tidak diberi peluang untuk menyatakan apa-apa tentang perkara-perkara E 'extraneous' tersebut dan ini menyebabkan keputusan yang diambil itu cacat (fatally flawed).

[14] The reason given in support of this application in that the said further ground was inadvertently excluded by the previous solicitors having conduct of the matter. F

[15] On this issue, it is trite that as a general rule, the appellate court does not allow a new point which was not raised in the court below to be raised and argued for the first time at the appellate stage. In the Privy Council case of *United Marketing Co.* G *v. Hasham Kara* [1961] 1 LNS 147, it is stated that a point not taken in the lower court will not be allowed to be argued unless the court is satisfied that the evidence on which it is asked to decide establishes beyond doubt that the facts, if fully investigated, would support the new plea. In *Rengasamy Pillai v.* H *Comptroller of Income Tax* [1970] 1 LNS 139, the Privy Council has also held that even if the facts are beyond dispute the court would not readily allow a fresh point of law to be argued without the benefit of the judgment of the judges in the court below. (Both the above cited cases were followed by the Federal Court I in the case of *S. Mariappan v. The Government of Malaysia* [1983] 2 CLJ 124; [1983] CLJ (Rep) 382).

[16] In order to justify the new point to be raised on appeal, it must be shown that the new point comes within the established exceptions, ie, jurisdiction, illegality or where, if the evidence on which the appellate court is asked to decide, if investigated, would fully support the new plea. (see: *Muniandy & Anor v. Muhammad Abdul Kader Muhd Saheed & Ors.* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116).

[17] In the present case, the new point relating to the extraneous issue (touching on the issue of unsatisfactory leave records of and leave applications by the appellant) was not raised by the appellant during the trial before the High Court. The appellant did not lead any evidence on the issues nor were they put to the witnesses of BNM that the extraneous issues were actually considered by the disciplinary committee. It is trite law that the failure to put one's case to his opponent's material witnesses would preclude the former from raising it in his argument. (see: *Browne v. Dunn* [1893] 6 R 67; and accepted by the Court of Appeal in *Aik Ming (M) Sdn. Bhd. & Ors. v. Chang Ching Chuen & Ors. & Another Case* [1995] 3 CLJ 639). The ground for the appellant's application does not fall within any one of the established exceptions accepted by the courts. To allow such an application would result in allowing a new line of defence or plea without hearing fresh evidence.

[18] The new point sought to be raised on appeal by the appellant would be prejudicial to BNM as the respondent, as its witnesses were not afforded an opportunity to respond or defend the appellant's allegation that the extraneous issues were considered by the disciplinary committee. (see: the Federal Court decision in *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405).

[19] On the above considerations, the court unanimously dismissed the appellant's application (*vide* encl. 22a) with costs.

Appeal Proper: Issues To Be Determined

[20] The issues for determination before this court (as well as the court below) are limited to the following:

(a) Whether the General Orders 1980 were applicable to the present case and, if the answer is in the affirmative, whether it has been complied with; and

(b) Whether the decision of BNM was fatally flawed on the ground that the appellant was not given the opportunity to mitigate before the punishment of dismissal was imposed on the appellant.

Appellant's Main Contentions

[21] The appellant's main contentions before this court (and the court below) are that:

(a) the General Orders are applicable to the appellant in this case and therefore he was entitled to all the rights and benefits thereunder particularly on the issues of reinstatement and right to be heard; and

(b) the appellant in this case was not afforded an opportunity to mitigate before his dismissal punishment was imposed by the disciplinary authority of BNM.

BNM's Contentions

[22] BNM on the other hand maintained that the General Orders (Chapter D) 1980 would not be applicable to the appellant and accordingly the appellant is not at liberty to demand for the compliance with the same. BNM also maintained that, in any event, the requirements of natural justice entrenched in the General Orders (ie, for a fair hearing) were complied with in this case as the appellant was afforded the opportunity to be heard (in the form of written explanations as well as oral representations) and also to mitigate before the final decision by the Governor of BNM to dismiss him from his employment with BNM, was affirmed.

Decision Of The High Court

[23] The learned High Court judge ruled in favour of BNM. On the issue of whether the General Orders is applicable to the appellant or not, his Lordship made the following findings:

> ... Perintah-perintah Am Bab "D" adalah untuk kakitangan Kerajaan mengikut Suruhanjaya yang dibentuk mengikut fasal tertentu dalam Perlembagaan Malaysia. Kakitangan Bank Negara berkerja mengikut kuasa-kuasa yang diberi melalui Akta Bank Pusat Malaysia, 1958. Bank Negara yang demikian, adalah suatu badan berkanun dan pekerja-pekerjanya bekerja mengikut peraturan-peraturan yang ditetapkan oleh Bank Negara sendiri bukannya mengikut Perintah-Perintah Am.

[24] In respect of the reference to the General Orders in the documentations in BNM's disciplinary proceeding against the appellant, particularly in the notice to show cause issued to the appellant, the learned judge made the following findings: A

> ... Kepada saya Bab "D" yang digunakan merupakan suatu mekanisme (peraturan) untuk penyiasatan. Ini kepada saya tidak menjadikan plaintif seorang kakitangan kerajaan yang boleh berlindung di bawah Perintah Am yang ditubuhkan khas untuk kakitangan kerajaan. Dengan lain-lain perkataan khidmat plaintif dengan defendan adalah antara plaintif dengan defendan, suatu badan berkanun. B C

[25] In respect of the allegation of denial of the right to mitigate, the learned judge ruled as follows:

> Gabenor BNM adalah Ketua Eksekutif Defendan. Rayuan telah dibuat kepadanya untuk meringankan hukuman ke atas plaintif setelah plaintif dimaklumkan keputusan jawatankuasa. D

Findings Of This Court

On The Issue Of The General Orders (Chapter D) 1980 E

[26] The General Orders were made expressly by the Yang di-Pertuan Agong in pursuance of power conferred by cl. (2) of art. 132 of the Federal Constitution. They were designed to give substance to the traditional degree of security of tenure to such holders of public offices who hold office during the pleasure of the Yang di-Pertuan Agong in respect of any conduct of the holder considered to be misconduct by the body that appoints him. F

[27] Order 2 of Part 1 of the General Orders specifically states that the General Orders are applicable to public officers who hold office in the public offices as set out in art. 132 of the Federal Constitution which comprises of public offices in the armed forces, the judicial and legal service, the general public service of Malaysia, the police force, the education service, the joint federal and state public services and finally the public service of each state. G H

[28] Generally, public officers enjoy special protection as conferred by art. 135 of the Federal Constitution which provides that no holder of such office shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard nor I

A shall he be so dismissed or reduced in rank by any authority subordinate to that other authority which has power to appoint him.

[29] Another benefit for being a public officer is that he may be B entitled to claim any declaration that his dismissal is void and invalid; and claim for reinstatement. For other employees who are not public officers, the appointments are based purely on contract. They can only claim for a declaration that his dismissal is wrongful and claim for damages, but not reinstatement (see: The Federal C Court decision in *Mohd Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135).

[30] In the present case, it is not in dispute that the appellant was employed by BNM under a contract of employment *vide* a D letter of appointment dated 26 January 1981 and was subjected to the terms and conditions contained therein and as further imposed by BNM from time to time. Paragraph 2(f) of the said letter of appointment specifically states "kakitangan-kakitangan sentiasa dikehendaki patuh kepada syarat-syarat kerja yang E ditentukan oleh Bank Negara Malaysia". The said contract does not make any specific reference to the applicability of the General Orders (Cap D).

[31] BNM is a statutory body or a body corporate established under s. 3 of the Central Bank of Malaysia Act 1958 (Revised in F 1994). The officers and employees of BNM are appointed by BNM, under s. 15 of the same Act. They hold office for such period, receive such salaries and allowances, and are subject to such other terms and conditions of service as may be determined by the Board of BNM.

G

[32] Clearly the appellant does not fall within the categories of public officer or employees as set out in art. 132 of the Federal Constitution, and therefore is not eligible for the protection and benefits under the General Orders.

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[33] The appellant argued that the General Orders were applicable in his case because of their incorporation in the notice to show cause dated 11 April 1989 as well as in the letter dated 12 July 1989 issued by BNM informing him of the decision of the disciplinary committee to dismiss him.

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[34] As stated earlier, under s. 15(2) of the Central Bank of Malaysia Act 1958 (Revised - 1994) BNM is empowered to determine such terms and conditions of service or employment for its officers and employees. In doing that, BNM is at liberty to adopt or incorporate all or any part of the General Orders as its own terms and conditions of service or employment. The adoption or incorporation of such General Orders in the appellant's notice to show cause and letter of decision by the disciplinary committee, does not have the legal effect of making him a holder of any such public office as categorized under art. 132 of the Federal Constitution. It does not translate to the General Orders being applicable to the appellant, nor does it create a right for the appellant to seek protection under the General Orders or to demand compliance with the same.

[35] The Federal Court in *Mohd bin Ahmad*'s case *(supra)* had expressed the same ruling on the same issue:

> In our view, the position is that the incorporation of such General Orders into the supervisor's contract of service does not have the legal effect of making him a holder of any such public office as categorized under article 132 of the Federal Constitution … Two parties to a contract cannot confer on either of themselves, to be legally acceptable, a specific statutory status, provided by a statute; in this case, art. 132 of the Federal Constitution, the supreme statute.

[36] On the issue of reinstatement as claimed by the appellant, the court is guided by the principle adopted by the Federal Court in *Mohd bin Ahmad*'s case *(supra)* as follows:

> … that the law will not specifically enforce a contract of service between master and servant and that the master has always the power to dismiss him in breach of such contract without any danger of being asked or compelled to re-employ him, thus the only remedy left to the servant is to sue for damages. The principle is that the court will not order specific performance of a contract of personal service … Following the principle aforesaid, the logical result will be that dismissed employee cannot claim any declaration that 'his dismissal was void' and if he wants to cast his pleading in the form of a declaration, then he can claim a declaration, eg, he was dismissed in breach of the contract of service and that he claims damages for such breach.

[37] The Federal Court, in the same case, further explained that the relief of reinstatement is only open to employees who lodge a claim for unfair dismissal pursuant to s. 20 of the Industrial Relations Act 1967, or to a holder of a public office as categorized under art. 132 of the Federal Constitution.

[38] On the above authorities, the court is satisfied that as the appellant does not come within the categories cited above, the relief of reinstatement is not available to him; and his only remedy, if any, should be for breach of contract and damages.

[39] In the present case, the appellant also claims for damages. However there is no indication that the appellant claims for a declaration that his dismissal was done wrongfully on a breach of contract by BNM. The issue of 'breach of contract by BNM' is not pleaded at all in the appellant's pleadings and statements of claim. The failure to plead such cause of action for 'breach of contract' is fatal to the appellant's case. The appellant has also failed to establish by evidence that in dismissing him, BNM was in breach of the employment contract between him and BNM. This principle was clearly laid down by the Federal Court in *Mohd bin Ahmad*'s case *(supra)* that "… he was entitled to claim damages only if he could establish that his dismissal was in breach of his contract of service".

On The Issue Of "Opportunity To Mitigate"

[40] The terms and conditions of employment of the appellant do not include a mandatory right to mitigate before a punishment is imposed by the disciplinary committee of BNM.

[41] The court is fully aware that the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action. He must be accorded fair hearing by the adjudicating authority; but the hearing may take many forms and does not require the strict insistence upon an inexorable right to the traditional courtroom procedure. The adjudicating authority has a duty to act fairly (see: *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; *Ridge v. Baldwin* [1964] AC 40; and *R. v. Gaming Board for Great Britain, ex parte Beraim and Khaido* [1970] 2 QB 417).

[42] In this regard, the appellant in the present case was given a notice to show cause dated 11 April 1989 detailing all the allegations of disciplinary misconducts made against him. He was afforded the chance to explain and to make representation orally as well as in writing, and to furnish documentary evidence to support his explanations. Finally, the appellant was accorded the opportunity to appeal to the Governor of BNM against the decision to dismiss him and in doing so, he had mitigated against the punishment.

[43] The same issue regarding the right to make representations on punishment in disciplinary proceedings was dealt with by the Federal Court in the case or *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Ultra Badi K. Perumal* [2001] 2 CLJ 525. The issue in that case was confined to the provisions of art. 135(2) of the Federal Constitution involving public servants in that no member of a public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

[44] Even with the express provisions of art. 135(2) of the Federal Constitution, yet the Federal Court in that case ruled that there is no separate right to make representations upon the punishment that ought to be meted to the officer to be dismissed or reduced in rank; and no injustice was occasioned by the failure to hear the mitigation separately.

[45] In the present case, art. 135(2) of the Federal Constitution and the General Orders do not apply. There is no express provision relating to the right to mitigate upon punishment accorded to the employees in the terms and conditions of their employment with BNM. Therefore the irresistible conclusion is that no such right ought to be meted to the appellant. In any event, the court is satisfied that the representation or mitigation made by the appellant in his appeal to the Governor of BNM before the punishment was affirmed, is sufficient.

[46] The court is satisfied that the BNM's decision to dismiss the appellant on all the five charges of misconducts against him was a reasonable decision in view of the circumstances of the case. His misconducts are serious in nature. Being the employer, BNM is in the best position to determine the seriousness of the appellant's misconducts. In this respect the court is in full agreement with

NH Chan JCA (dissenting) in the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, when he said:

> ... The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

[47] In the present case, the court is satisfied that it was reasonable for BNM to have taken the view that dismissal was the appropriate punishment. The 'offences' or misconducts for which the appellant had committed were serious and grave in any establishment and that it was quite reasonable for BNM as the employer, to dismiss him.

Conclusion

[48] Having regard to all the circumstances of the case, this court, unanimously holds that the appeal herein is without merit and therefore be dismissed with costs of RM500 to be paid to the respondent.